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ALLAN H. BARIS
MICHAEL J. L. CUSICK
JENNIFER L. FARVE

BART L. RICKENBAUGH (1966-2002)

LIFE OF MONTANA BUILDING , SUITE 10
601 HAGGERTY LANE
BOZEMAN, MONTANA 59715
Reply to
P.O. BOX 1288
BOZEMAN, MONTANA 59771-1288
TELEPHONE: (406) 587-5511
FAX: (406)587-9079
E-MAIL: morlaw@qwest.net

November 22, 2004 ***Via Hand Delivered***

Hon. C. Bruce Loble
Montana Water Court
601 Haggerty Lane
P.O. Box 1389
Bozeman, MT 59771

RE: Comments to Proposed Water Right Adjudication Rules
Our file no: 66060\001

Dear Judge Loble:

Enclosed please find my comments to the Water Court's proposed water right adjudication rules that will be submitted for final review and approval to the Montana Supreme Court.

For the most part, the proposed rules appear to merely reflect the ongoing practices of the Water Court that have existed for the past several years. However, I do have the following concerns about the following procedures set forth in the proposed rules:

1. Mandatory On Motion Policy. Rule 1.II(9) provides that the Water Court will address all issue remarks appearing on the abstracts of claims in any preliminary, temporary preliminary or other interlocutory decree. The rules appears to mandate the Water Court to review sua sponte all issues or potential issues identified by the Department of Natural Resources and Conservation (DNRC) during the claims examination process.

This subject has been the topic of much discussion at the Water Adjudication Water Advisory Committee meetings over the past several years. At the February 26, 2004 meeting of the Advisory Committee, a motion was made by John Bloomquist that if a more aggressive "on

motion" process is implemented by the Court at this time, it should be implemented by Court rule rather than by legislation as proposed by the Attorney General's representative, Candace West. The Committee voted four (Goffena, Cusick, Josephson, Bloomquist) to three (West, Manly, Hall) in favor of that motion. The motion did not resolve the issue of whether a mandatory "on motion" review of all DNRC examination issue remarks is necessary.

I understand that the Environmental Quality Council (EQC) has requested that you finalize Water Court procedural rules that address the Water Court's on motion policy. In its letter of September 16, 2004, the EQC requested that the Water Court promulgate rules concerning an "on motion" policy but refrained from requesting that the court adopt a mandatory "on motion" policy. The EQC further stated that they were of the opinion that the Water Court has authority to review claims on its own motion pursuant to and consistent with your decision in the "on motion case" Case WC-92-3 (Montana Water Court, February 18, 1995). The proposed rule subsection (9) goes beyond the rules that have been requested by the EQC, is unnecessary, and is contrary to the decision in Case WC-92-3 and the purpose of the adjudication.

Pursuant to Mont. Code Ann. § 85-2-233(1) the DNRC has standing to object to any water right issued in a temporary preliminary decree by the Water Court. By statute, the DNRC was intended to be the institutional objector in this adjudication. The examination issue remarks that are the result of DNRC's claims examination were intended to be used as a tool by DNRC in its role as institutional objector, and as a tool by other objectors in reviewing Water Court interlocutory decrees. Due to reductions in funding over the years, the DNRC's role as institutional objector has essentially become an unfunded mandate. If the DNRC does not have the resources to perform this role, it is unlikely that the Court has the resources to perform it and at the same time remain the neutral arbiter of water right claims in this adjudication.

Mont. Code Ann. § 85-2-227 provides that properly filed statements of claim of existing water right are prima facie proof of their content. If the legislature had intended that issue remarks based on historical water resources surveys conducted by the former State Engineer's office were to be of sufficient weight to overcome the prima facie validity of a statement of claim, they would have stated so. They did not. For example, in Idaho's adjudication, the legislature provided that the examination reports completed by the State Engineer's office are given prima facie validity rather than the actual statement of claim. The framers of Montana's adjudication clearly intended, through the prima facie statute, that in the absence of contrary evidence presented by another interested party,

the evidence set forth in a valid statement of claim would carry the day.

A mandatory "on motion" policy would go against this clear legislative intent. Furthermore, the underlying premise of such a policy - to ensure the "accuracy" of the adjudication - is based on a false premise. This is particularly true with respect to issue remarks concerning the number of acres irrigated or place of use of an irrigation water right, which is the predominant issue remark that appears in Water Court decrees. These remarks are based on water use in a given year rather than on a total picture of historical beneficial use. Simply because an appropriator only irrigated 50 acres as opposed to the 150 acres in his claim in 1965 when the Water Resource Survey was done, does not mean that that is the extent of the historical beneficial use of the right. The same is true of the extent of irrigation shown on the 1979 aerial photograph, the other data source commonly used by the DNRC to examine irrigated acreage. The amount of irrigation taking place in any season depends on the appropriator's needs for that season as well as water availability. Junior water rights can only be exercised to the extent that they do not effect senior water rights on the same source. Simply because a junior appropriator does not irrigate his entire place of use during a dry year, does not mean that his right is so limited when there is sufficient water available to irrigate all of his claimed land in a year when sufficient water is available.

Accuracy is truly in the eye of the beholder. Montana's adjudication was designed to provide notice to parties with water rights in the temporary preliminary decree of the claims of their neighbors and to give them an opportunity to have their objections to their neighbors claims heard. Those are the fundamental requirements of due process. Only if the stakeholders whose interests are affected by the decrees participate in the process can any degree of accuracy be obtained. If parties choose not to participate, they must accept the consequences of that decision. The argument that if the decrees are "inaccurate", they can later be challenged by a party to the adjudication (such as the federal government) is flawed. Any party who has notice of these claims and the examination issue remarks that does not file an objection and avail themselves of their due process rights, would have a difficult time later challenging the "accuracy" of the decrees.

On the other hand, if as a result of the proposed Rule a party relies on the Water Court to resolve issues, and those issue remarks are not resolved or are dismissed by the Court as insignificant, that party may have a legitimate challenge to the adjudication process. While the goal of achieving better "accuracy" may be well-intentioned, a mandatory "on motion" policy may actually insert a

much more serious potential flaw into the process. The result would be fewer parties participating as objectors, more parties relying on the Court to act as their "advocate," and more potential for dissatisfied parties to challenge the process if the Court does not decide an issue remark in a manner favorable to their interests.

In order to protect the integrity of this adjudication, the Court needs to remain the neutral tribunal. That is not to say that the Water Court does not have authority to review issues sua sponte. The authority to do so is clear and discretionary as outlined in your decision in Case WC-92-3. However, the Court should refrain from exercising this authority, particularly for issue remarks involving factual matters (such as irrigated acreage) that standing alone are insufficient to controvert the prima facie claim.

The single largest problem in this adjudication is the loss of historical evidence. Adoption of a mandatory "on motion" policy by the Water Court will further compound this problem. As more time elapses from the crucial date of July 1, 1973, witnesses with knowledge of pre-1973 historical water use will pass away at an increasing rate. Thus, the Water Court should focus on resolving actual disputes over historical use between water users, rather than focus on resolving remarks to which no party has bothered to file an objection. Resolving unnecessary issues will divert the Court's time from real issues by actual parties in need of a remedy.

The best way to gauge the significance of an issue remark is to see if any party has taken the time to file an objection to the claim. If the state of Montana, the federal government, or other parties have concerns about claims with issue remarks that may affect their claims or water reservations, then they need to participate as objectors in the adjudication. They should not expect the Court to represent their interests for them. Burdening the Court with this responsibility will further slow down the adjudication.

In its September 16, 2004 letter, the EQC acknowledged that the Water Court has discretion to determine what issues are significant enough to require Water Court review. All that is necessary to satisfy the legislature's concerns is the implementation of a procedural rule that will govern how the Water Court exercises its discretion to review claims on its own motion when it determines that it is necessary to do so.

The procedure for reviewing claims *sua sponte* should be the process that has been used for the past 15 years by the Water Court. The process should involve an initial status conference between the Water Court, the claimant, and the DNRC hearings examiner. The Water Master would ask the DNRC hearings examiner to briefly discuss the

basis of the issue remarks, the claimant would then have an opportunity to respond, the Water Master would ask that the claimant and the DNRC examiner to meet if necessary to further discuss the claim and the issue remarks and report back by a certain date as to whether the issue remark can be resolved. The Water Master would review and approve any amendments to the claim made as the result of this process, or would set the case for hearing in the event a resolution is not possible and the particular issue remark is significant enough to warrant a contested case hearing. At the hearing, the claimant would have the right to cross-examine the claims examiner and produce further evidence in support of the claim. The Court could ask questions of both the claimant and the claims examiner. The Court would then render a decision on the claim.

The implementation of this process should be in the discretion of the Court on a case by case basis as outlined in your decision in Case WC-92-3. Many issue remarks do not warrant an in-depth review by the Court. On the other hand, there are issue remarks of significance that do warrant sua sponte review by the Court. The best example is the validity and res judicata affect of prior district court water decrees and the affect of those prior decrees on statements of claim filed in this adjudication. The Water Court should make every effort to uphold these historical water decrees including review of claims for decreed rights on its own motion when such rights have been overclaimed (i.e. "decree exceeded"). These issues generally involve legal questions such as issue and claim preclusion and the law of the case rather than factual matters such as the number of acres irrigated.

In summary, I suggest that subsection (9) be revised to provide that review of issue remarks shall be discretionary by the Water Court. Subsection 10 should be revised to provide a more definite step by step procedure for review of issue remarks when the Court determines it will exercise that discretion.

2. Motions to Amend. Pursuant to 1997 amendments to Section 85-2-233, claimants are now allowed an opportunity to amend their claims after the issuance of a temporary preliminary or other interlocutory decree by providing notice to potentially affected parties. The prima facie statute, Mont. Code Ann. § 85-2-227 provides that a claim of existing water right or an amended claim of existing right constitutes prima facie proof of its content until the issuance of a final decree. Thus, according to the statute, once a claim is amended, (either prior to the issuance of a decree or through the post decree process provided for in Mont. Code Ann. § 85-2-233(6)) the claim is prima facie proof of its content.

The proposed rule at subsection (12) states that "the motion will be determined using the same procedures the Water Court uses for resolving objections." The burden of proof applicable to objections is inappropriate for the burden on a motion to amend. The amount of evidence needed to amend a claim should not be as high as the amount of evidence required to disprove a prima facie claim. Rather, the evidence required should be an amount necessary to support the motion. The claimant should only be required to provide evidence to support the amendment; the claimant should not be required to disprove the claim as originally filed. The amendment should be treated no different than a pre-decree amendment, with the exception that notice to other users is required.

I suggest that the last sentence of subsection (12) be revised to state that the moving party shall bear the burden of proof and persuasion on the motion to amend in the event that the motion is opposed. If the motion is properly supported and unopposed after notice is given to other parties, the motion should be deemed well taken pursuant to uniform district court rule II. The Court should have discretion to review the contents of any motion to amend *sua sponte* and to deny an improper motion to amend under certain circumstances. However, it would be inappropriate to create a burden of proof on an unopposed motion to amend that is the equivalent of the burden of proof by an objecting claimant. By statute, properly amended claims are to be given the same measure of rectitude as all prima facie statements of claim.

3. Admissibility of Claims Examination Information. Former Rule 1.II(1) of the Water Right Claims Examination Rules provided that investigation reports, data or other written information produced or promulgated by the DNRC under the direction of the Water Court pursuant to Mont. Code Ann. § 85-2-243 shall be admissible without further foundation and is not subject to the hearsay objection in any proceedings before the Water Court. The proposed rules eliminate this provision at the beginning of Rule 1.II and add a new subsection (15) concerning admissibility of Department data. Information identified in proposed Subsection (15) includes memoranda by the DNRC in response to a request for assistance, a field investigation report, or the results of an on site visit. Like the former rule, this information is admissible without further foundation and not subject to the hearsay objection. However, the proposed rule at subsection (15) does not address the admissibility of DNRC claims examination information in Water Court proceedings where the Department is not a party. This information has historically been used by objecting parties in Water Court proceedings as part of the record for a claim. Subsection (15) should be revised so that it clearly provides that DNRC claims

examination worksheets, issue remarks, reports, and other information are likewise admissible without further foundation and are not subject to the hearsay objection. The rules should continue to provide that due provision should be made by the Water Court to allow any party to cross examine the Department employee who examined the claim or provided the assistance, report, or other information.

4. Water Decree Enforcement. Pursuant to Mont. Code Ann. § 85-2-406(4) the district courts are charged with supervising the distribution of water pursuant to water court decrees. In an action to enforce a temporary preliminary decree, the district court may refer the matter to the Water Court to provide one or more tabulations or list of all existing rights and their relative priorities. Subsection (31) of the rules provides an exhaustive list of what the Water Court may provide district court upon such a referral. The statute is clear and no further clarification as to what the Water Court will provide the district court is necessary. The information that the Court will provide in a tabulation to the district judge is already included in the abstracts of the water rights as they appear in the temporary preliminary decree and an index of those rights organized by source, priority date, owner, point of diversion, etc. Any additional information that might be necessary should be determined on a case by case basis.

Subsection (31) of the rule is unnecessary and appears to create jurisdiction in the Water Court to enforce and supervise water distribution in contravention of Mont. Code Ann. § 85-2-406. The Water Court should focus on adjudicating existing rights. Committing limited Water Court resources to areas within the jurisdiction of the district courts will slow down the adjudication.

5. Definition of Split Claim. The definition of a "Split Claim" at Rule 1.III(5a) should be revised to recognize that some transfers may result in co-ownership rather than a division of the water right. Claims should only be split when the parties request it by filing an addendum showing the proper division of the right.

6. Definition of Springs. The definitions of "Developed Spring" and "Undeveloped Spring" at Rule 1.III(60) are ambiguous. For example, subsection (64) defines surface water as including water from an "undeveloped spring." However, the definition of "Undeveloped Spring" in subsection (60) states that it is surface water if the flow from the spring is not increased by manmade development. As a result, the rules imply that some undeveloped springs may be groundwater. Likewise, the definition of "Developed Spring" implies that some spring developments are surface water. The rules should clearly define that a "development" must bring additional groundwater to the surface, and that such "Developed

Springs" are classified as groundwater appropriations. All other appropriations from springs should be considered undeveloped and classified as surface water consistent with § 89-801 RCM (1947).

7. Municipal Claims. The volume guideline for municipal claims has been changed from a guideline of that "which appears reasonable and customary for the specific purpose using information in the claim and other data gathered by the Department" to a guideline of 250 gallons per capita per day.

The volume guideline for municipal claims is arbitrary and unsupportable. The 250 gpcd guideline is based on incomplete information submitted by the City of Phillipsburg. See Supplemental Brief in Case 43D-69, claim 43D-W-043377-00; see DNRC Claims Examination Manual, Exhibit X-18. The 250 gpcd guideline was arrived at as the "reasonable and customary" use guideline for the City of Phillipsburg and is now proposed to be applied across the board to all municipalities. Such a guideline is completely arbitrary.

Furthermore, municipalities have historically been allowed to appropriate more water than they can beneficially use at the time of appropriation in order to accommodate future growth. City and County of Denver v. Sheriff, 105 Colo. 193, 96 P.2d 836 (1939). Application of an arbitrary standard of 250 gpcd fails to recognize the unique requirements of municipalities.

Stored volume for future growth should not be reviewed under the 250 gpcd standard. Rather, it should be based on storage capacity. Similarly, direct flow municipal claims should not be reviewed under the arbitrary 250 gpcd standard. Direct flow claims should not be decreed a specific volume at all under Mont. Code Ann. § 85-2-234(6)(b)(i). The volume guideline should be the capacity of the system under the former rule of "reasonable and customary" use.

Thank you for the opportunity to comment on the proposed rules. If you have any questions concerning these comments, please give me a call.

Sincerely,

MICHAEL J. L. CUSICK

cc: Walter McKnut, Chair, Environmental Quality Council
Mike Wheat, Esq.
Krista Lee Evans, Environmental Quality Council
SK8123.WPD